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Rethinking Equal Protection

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RETHINKING EQUAL PROTECTION

Plyler v. Doe[1]

Ordinarily, the Supreme Court uses a two-tier test to decide equal protection cases.[2] If the Court finds that the challenged state action infringes on a fundamental right[3] or adversely affects a suspect class,[4] it applies strict scrutiny.[5] Statutes subjected to strict scrutiny almost always are invalidated.[6] If neither a fundamental right nor a suspect class is involved, the Court employs a rational basis test.[7] Except in rare cases,[8] the Court upholds legislation against rational basis attacks.[9]

In *Plyler v. Doe*,[10] however, the Court applied the nascent intermediate standard, which demands that the challenged state action bear a substantial relation to a substantial state interest.[11] The Court held that the equal protection clause[12] prohibited the State of Texas from denying free public education to undocumented alien children.[13] The decision is important, aside from its

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1. 457 U.S. 202 (1982).
2. *E.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).
3. In addition to the liberties explicitly guaranteed by the Bill of Rights, U.S. CONST. amend. I-X, the Court has identified a variety of fundamental rights implicit in the Constitution. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (family life); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Boddie v. Connecticut, 401 U.S. 371 (1971) (divorce); Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Reynolds v. Sims, 377 U.S. 533 (1964) (voting in state elections); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (raising children); *see generally* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1074-83 (1979).
4. *See, e.g.*, Strauder v. West Va., 100 U.S. 303 (1879) (race); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (national origin); Graham v. Richardson, 403 U.S. 365 (1971) (alienage).
5. To withstand strict scrutiny, the challenged legislation must advance a compelling governmental interest by the least restrictive means. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973).
6. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting).
7. Two definitions of this test have surfaced. Justice Brennan prefers an exacting formula, demanding that "the challenged legislation . . . rationally further some legitimate governmental interest." Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (Brennan, J.). Justice Rehnquist favors a more deferential standard, which upholds legislation "if any state of facts reasonably can be conceived that would sustain it." United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980) (Rehnquist, J.).
8. *E.g.*, Department of Agriculture v. Moreno, 413 U.S. 528 (1973).
9. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. at 319 (Marshall, J., dissenting).
10. 457 U.S. 202 (1983) (5-4 decision).
11. *E.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (gender discrimination); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (reverse racial discrimination); Lalli v. Lalli, 439 U.S. 259 (1978) (state law disadvantaging illegitimate children).
12. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
13. Technically, persons who enter the United States without permission are subject to

unprecedented substantive content, because the Court departed from traditional equal protection analysis and applied an intermediate standard of review. Unfortunately, the *Plyler* majority does not convincingly explain why such a standard was appropriate.[14] Chief Justice Burger's dissenting view that *Plyler* represents a result-oriented approach is technically correct;[15] the case is inconsistent with the two-tier equal protection model and recent precedent.

Ultimately, the decision can be evaluated as an exercise of the power of judicial review in an extraordinary and compelling case. The thesis of this Note is that the *Plyler* Court, guided by Justice Powell, acted properly in striking down an intentionally invidious statute without unduly expanding the purview of the equal protection clause.

In 1975, Texas amended its education code to provide state funds to local school districts for the exclusive benefit of children who are United States citizens or legally admitted aliens.[16] The revision also authorized local school officials to charge undocumented children tuition or to exclude them from public schools.[17] The primary purpose of the revision was to deter illegal immigration.[18].

In *Doe v. Plyler*,[19] a class action was brought challenging the statute on equal protection grounds. The Tyler, Texas school board had imposed a one thousand dollar tuition fee on undocumented children.[20] The families of the

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deportation and criminal prosecution. *See* 8 U.S.C. §§ 1251-1252, 1325 (1982). Yet federal immigration laws are practically unenforceable; an estimated one million Mexicans illegally enter the United States each year. 128 CONG. REC. S10615 (daily ed. Aug. 17, 1982) (remarks of Sen. Domenici). The states are virtually powerless to regulate naturalization in view of Congress's constitutional mandate to pre-empt the field. *See* U.S. CONST. art. I, § 8, cl. 4; *see also* The Chinese Exclusion Case, 130 U.S. 581 (1889) (Congress has inherent power to regulate immigration). In 1983, the Senate passed a bill designed to curb illegal immigration. S. 529, 98th Cong., 1st Sess., 129 CONG. REC. S6969-86 (daily ed. May 18, 1983). The bill proscribes knowing employment of illegal aliens and grants permanent or temporary resident status to unlawful entrants who have resided in this country for a prescribed period. A similar bill is pending before the House. H.R. 1510, 98th Cong., 1st Sess., 129 CONG. REC. H2104-05 (daily ed. April 18, 1983).

14. Justice Brennan, joined by Justice Stevens, wrote the plurality opinion. Justices Marshall, Blackmun, and Powell each concurred separately.

15. 457 U.S. at 242 (Burger, C.J., dissenting) (White, Rehnquist, O'Connor, JJ., joining).

16. TEX. EDUC. CODE ANN., § 21.031(a) (Vernon 1982).

17. *Id.* § 21.031(c).

18. *In re* Alien Children Educ. Litig., 501 F. Supp. 544, 578 n.84 (S.D. Tex. 1980) (interpreting legislative history), *summarily aff'd*, No. 80-1807 (5th Cir. Feb. 23, 1981), *aff'd*, 457 U.S. 202 (1982). Employment is the primary incentive for illegal immigrants, *see* Nafziger, *A Policy Framework for Regulating the Flow of Undocumented Mexican Aliens into the United States*, 56 OR. L. REV. 63, 86-87 (1977), and deleterious effects of their presence in the domestic labor market are well documented. *See, e.g.*, Rodino, *The Impact of Illegal Immigration on the American Labor Market*, 27 RUTGERS L. REV. 245 (1973). *But see* Wolin, *Americans Turn Down Many Jobs Vacated by Ouster of Aliens*, Wall St. J., Dec. 6, 1982, at 1, col. 1.

19. 458 F. Supp. 569 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *aff'd*, 457 U.S. 202 (1982). A parallel class action to enjoin enforcement of the Texas statute was consolidated with *Doe v. Plyler* for review by the Supreme Court. *In re* Alien Children Educ. Litig., 501 F. Supp. 544 (S.D. Tex. 1980), *summarily aff'd*, No. 80-1807 (5th Cir. Feb. 23, 1981), *aff'd*, 457 U.S. 202 (1982).

20. Doe v. Plyler, 458 F. Supp. at 572.

named plaintiffs had resided in Tyler for between three and thirteen years.[21] The United States District Court for the Eastern District of Texas emphasized that the vast majority of the children affected by the statute "are or will become permanent residents of this country."[22]

In discussing the applicable standard of review, the district court considered the history of exploitation encountered by illegal aliens in Texas.[23] It observed that the statute would inevitably create a permanent subclass of illiterates within the state.[24] The court decided, however, that it was unnecessary to resolve whether undocumented children were a suspect class or whether education was a fundamental right, because the Texas statute had no rational basis.[25]

Noting that the Texas legislature had taken no action to discourage employment of illegal aliens, the court rejected the argument that the statute was a rational means of deterring illegal immigration.[26] The court also rebuffed the contention that the exclusion of undocumented children was reasonably related to the State's interest in preserving public resources;[27] the enactment of the statute was simply a callous attempt to cut costs at the expense of a group of defenseless children.[28] The United States Court of Appeals for the Fifth Cir-

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21. *Id.* at 574.

22. *Id.* at 578. The district court in *In re Alien Children* found that illegal aliens generally enjoy "*de facto* amnesty." 501 F. Supp. at 558-59.

23. Doe v. Plyler, 458 F. Supp. at 583; *see also In re* Alien Children, 501 F. Supp. at 570 (comparing illegal aliens to antebellum slaves); *see generally* Ortega, *Plight of the Mexican Wetback,* 58 A.B.A. J. 251 (1972); Salinas & Torres, *The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis,* 13 HOUS. L. REV. 863 (1976).

24. Doe v. Plyler, 458 F. Supp. at 577; *see also In re Alien Children,* 501 F. Supp. at 562 n.34 (uneducated children remain unsocialized and unable to cope with society).

25. Doe v. Plyler, 458 F. Supp. at 485. In contrast, the district court in *In re Alien Children* held that education is a fundamental right and applied strict scrutiny to strike down the statute. 501 F. Supp. at 564. This variance demonstrates that the Supreme Court arguably could have employed either of the two traditional standards of review and reached the same result.

26. Doe v. Plyler, 458 F. Supp. at 485. In De Canas v. Bica, 424 U.S. 351 (1976), the Supreme Court upheld a California ban on employment of illegal aliens against the claim that Congress's constitutional authority over naturalization precluded all state involvement. The Court observed that the California statute was consistent with congressional efforts to remove the primary economic incentive for illegal immigration. *Id.* at 357-61. In *Doe v. Plyler,* the district court found that the state's failure to proscribe employment of aliens undermined any earnest attempt to assert an exclusionary motive. 458 F. Supp. at 485.

As a result of Texas lobbying pressure, federal immigration policy ensures that employment opportunities continue to attract unlawful entrants. *In re Alien Children,* 501 F. Supp. at 565. The federal prohibition on harboring illegal aliens expressly provides that employment "shall not be deemed to constitute harboring." 8 U.S.C. § 1324(a) (1982). In 1982, federal legislation which would proscribe employment of illegal aliens passed the Senate, 80-19. S. 2222, 97th Cong., 2d Sess., 128 CONG. REC. S10619-31 (daily ed. Aug. 17, 1982). Six of the eight senators from states bordering Mexico voted against it. *See* 128 CONG. REC. at S10618-19; *see also* Chase, *Growers Rail Against Efforts to Stem Flow of Illegal Aliens,* Wall St. J., Aug. 4, 1983, at 1, col. 1; Harwood, *Congress's Bad Immigration Bill,* Wall St. J., Sept. 17, 1982, at 28, col. 1.

27. Doe v. Plyler, 458 F. Supp. at 588-89.

28. "The expediency of the state's policy may have been influenced by two actualities: children of illegal aliens have never before been afforded any judicial protection, and little political uproar was likely to be raised on their behalf." *Id.* Compare Hernandez v. Houston Indep. School Dist., 558 S.W.2d 121 (Tex. Civ. App. 1977), where the state court applied the rational basis test

cuit affirmed the rational basis analysis,[29] and the State appealed to the United States Supreme Court.

As a threshold issue, the Court considered whether the fourteenth amendment's guarantee of equal protection extended to illegal aliens. The State maintained that persons who unlawfully entered the country were beyond the jurisdiction of the states for equal protection purposes.[30] All nine Justices rejected this "outlaw theory," and held that any person who comes within the physical boundaries of a state is due some form of equal protection.[31] The question, then, was not whether the plaintiffs deserved equal protection, but the quality of protection to which they were entitled.

Four members of the *Plyler* majority—Justices Brennan, Stevens, Marshall, and Blackmun—deemed it proper to wield a substantive equal protection clause.[32] These four Justices applied an intermediate standard of review in name only;[33] they all indicated that education is a fundamental right, the deprivation of which deserves strict scrutiny. These Justices apparently felt compelled to apply a lesser standard in order to accommodate Justice Powell.[34]

The plurality opinion of Justice Brennan, joined by Justice Stevens, initially acknowledged the holding in *San Antonio Independent School District v. Rodriguez*[35] that public education is not a fundamental right.[36] Undaunted, the plurality proceeded to describe the "fundamental role" of public schools in our society.[37] Justice Brennan observed that education was crucial to aid the plaintiffs in their escape from poverty, just as it is crucial to any child who reasonably expects to succeed.[38] The plurality concluded that the confluence of the right deprived and the disadvantaged social status of the plaintiffs required invalidation of the Texas statute.[39]

Justice Marshall delivered a curt concurrence and offered no pretense of relying on precedent, as he reiterated his view that "an individual's interest in education is fundamental."[40] Justice Blackmun also concurred separately.[41]

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and upheld the statute. The Texas tribunal concluded that an undocumented child is not entitled to the equal protection of the laws because his presence in the country is unlawful. *Id.* at 124.

29. 628 F.2d at 454-58.

30. Plyler v. Doe, 457 U.S. at 210-11; *see* Hernandez v. Houston Indep. School Dist., 558 S.W.2d at 124.

31. 457 U.S. at 215; *id.* at 243 (Burger, C.J., dissenting).

32. *Cf.* Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1060-70 (1979) (substantive equal protection involves enforcement of Court's value judgments).

33. 457 U.S. at 218 n.16.

34. *See id.*

35. 411 U.S. 1, 35 (1973).

36. 457 U.S. at 221.

37. *Id.*

38. *Id.* at 222 n.20, 223 (citing Brown v. Board of Educ., 347 U.S. 483, 489 (1954) (free public education "is a right which must be made available to all on equal terms")).

39. 457 U.S. at 223-24.

40. *Id.* at 230 (Marshall, J., concurring); *see Rodriguez*, 411 U.S. at 70-133 (Marshall, J., dissenting). Justice Marshall had argued the case against segregated school facilities in *Brown*.

41. 457 U.S. at 231 (Blackmun, J., concurring).

He agreed with Justice Marshall that the character of the interest at stake was dispositive, and attempted to reconcile *Plyler* with precedent by making two points. First, Justice Blackmun distinguished *Rodriguez* as involving only a relative deprivation of educational quality.[42] Second, he suggested a precedent for the right to education by drawing an analogy to voting rights.[43] Despite its lack of textual foundation in the Constitution, the Court has deemed the right to vote fundamental because it affords individuals an opportunity to participate in the political process.[44] Justice Blackmun reasoned that education is fundamental because it affords individuals an opportunity to participate and advance in society.[45] This reasoning is tenuous.[46] Nevertheless, Justice Blackmun indicated that but for the Court's invocation of the intermediate standard, it would have been appropriate to examine the Texas statute with strict scrutiny.[47]

In the final analysis, the standard of review applied by the Brennan bloc[48] is unimportant. These four Justices suggested that the Texas statute was simply unconscionable.[49] Their conclusion derived not from judicial analysis, but from a shared judicial philosophy. At the center of their jurisprudence stands the notion of a "Living Constitution," the idea that the law of the land must be responsive to the changing needs of society and, in particular, to the frus-

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42. *Id.* at 235. *Rodriguez* involved an equal protection attack on the Texas public school funding system, which relied on local school districts to supplement state funds with property tax revenues. The Court held that the system did not violate the equal protection clause, even though it resulted in lower per pupil expenditures in poorer school districts. 411 U.S. at 59.

43. 457 U.S. at 234.

44. *Id.; see* Dunn v. Blumstein, 405 U.S. 330 (1972) (invalidated one-year voter registration residency requirement); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (invalidated poll tax); Reynolds v. Sims, 377 U.S. 533 (1964) (mandated "one person one vote" state legislative apportionment).

45. 457 U.S. at 234.

46. Justice Blackmun's analogy has three flaws. First, the plaintiffs in the voting rights cases were citizens, not illegal aliens. The notion that a citizen's right to equal representation is implicit in the Constitution does not support the conclusion that the document also guarantees unlawful entrants opportunities to advance in society. Second, the analogy fails to account for the Court's past requirement of absolute equality at the ballot box but not at the schoolhouse. Finally, it is difficult to distinguish education from food, shelter, and health care as a necessary precondition to exercising opportunity. The Court has refused to recognize any of these important interests as fundamental. *See, e.g.,* Jefferson v. Hackney, 406 U.S. 535, 546-47 (1972) (no fundamental right to welfare payments). In *Plyler,* Justice Blackmun attempted to characterize education as a "means" and these other basic necessities as "ends." 457 U.S. at 234 (Blackmun, J., concurring). Intuitively, this distinction seems viable. On closer inspection, however, the characterization may be reversed: a child cannot learn if he is ill or unfed.

47. 457 U.S. at 235 n.3.

48. Although categorizing Justices Brennan, Stevens, Marshall, and Blackmun as a bloc is an oversimplification, in the present context the label is accurate and useful.

49. *See Plyler,* 457 U.S. at 218-19 (Brennan, J.).

> This situation raises the specter of a permanent class of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under the law.

Id.

trated aspirations of society's victims.[50]

This philosophy, which rose to prominence under the Warren Court, operates on two premises. First, the Constitution vests broad authority in the Court to divine fundamental values[51] and to enact these values as constitutional norms through the fourteenth amendment.[52] The leading exercise of this authority was *Roe v. Wade*,[53] where Justice Blackmun declared that the Constitution protects a women's right to terminate her pregnancy.[54] Similarly, in *Plyler*, the Brennan bloc identified basic educational opportunity as a constitutionally protected right. That the right to education has no explicit textual source in the Constitution is insignificant; the Living Constitution mandates that the right be recognized and enforced.[55]

The second premise is based in the belief that the federal courts should actively assist the advancement of disadvantaged minorities.[56] Implicit in this belief is the identification of "equality" as a constitutional norm.[57] Accordingly, Justices Brennan, Marshall, Blackmun, and Stevens have given special consideration to racial minorities,[58] social reformers,[59] state prisoners,[60] indigents,[61] legal aliens,[62] and now, undocumented children.

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50. *See* Brennan, *Justice Thurgood Marshall: Advocate for Human Need in American Jurisprudence*, 40 MD. L. REV. 390, 391 (1981).

51. *See* Ely, *The Supreme Court, 1977 Term—Foreward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 5-8 (1978).

52. This approach is treacherous. The intractable problem lies in determining which values are sufficiently important to be vindicated by unelected judges over contrary legislative judgments. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962). For example, in Lochner v. New York, 198 U.S. 45 (1905), the Court invalidated maximum-hour legislation because it infringed on the fundamental freedom to contract. Beginning with *Lochner*, the Court embarked on an era of enforcing its laissez faire economic philosophy through judicial review. *Lochner* and its progeny have been universally discredited. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955). This criticism stands today as a strong admonition against judicial enforcement of unwritten fundamental values.

53. 410 U.S. 113 (1973); *see generally* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

54. 410 U.S. at 153; *see also* Harris v. McCrae, 448 U.S. 297, 329-57 (1980) (Brennan, Marshall, Blackmun, and Stevens, JJ., dissenting) (Constitution requires the federal government to subsidize abortions for the poor).

55. Justice Blackmun "predicted" the result in *Plyler* before the action was even filed: "I see the increasing awareness and recognition of equality of educational opportunity. We have been at this, theoretically, for over twenty years now but we're a long way from being through with it." H. Blackmun, Address at Dedicatory Proceedings for the Waterman Hall Addition (April 7, 1976), *reprinted in* 30 ARK. L. REV. ix, xviii (1976).

56. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

57. *See* Matthews v. Lucas, 427 U.S. 495, 516 (1976) (Stevens, J., dissenting).

58. *See, e.g.*, City of Port Arthur v. United States, 457 U.S. 922 (1982); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

59. *See, e.g.*, Brown v. Socialists Workers '74 Campaign Comm., 103 S. Ct. 416 (1982); Warth v. Seldin, 422 U.S. 490, 519 (1975) (Brennan, J., dissenting).

60. *See, e.g.*, Smith v. Wade, 103 S. Ct. 1625, 1640 (1983); Allen v. McCurry, 449 U.S. 90, 105 (1980) (Blackmun, J., dissenting); Bounds v. Smith, 430 U.S. 817, 821 (1977).

61. *See, e.g.*, Harris v. McCrae, 448 U.S. 297, 329-57 (1982) (Brennan & Marshall, JJ., dissenting); Department of Agriculture v. Moreno, 413 U.S. 528 (1973).

62. *See, e.g.*, Ambach v. Norwich, 441 U.S. 68, 84 (1979) (Blackmun, J., dissenting); Graham v. Richardson, 403 U.S. 365, 376 (1971).

In contrast, the Burger bloc[63]—the Chief Justice, joined by Justices White, Rehnquist, and O'Connor—dissented in *Plyler* and denied that the Constitution entitled undocumented children to free public education.[64] Relying on *San Antonio Independent School District v. Rodriguez*,[65] Chief Justice Burger concluded that education is not a fundamental right.[66] The Chief Justice also asserted that the *Plyler* plaintiffs were not members of a suspect class, for their disfavored status stemmed solely from their violation of federal immigration laws.[67] In the absence of a fundamental right or suspect class, the dissenters applied the deferential rational basis test and determined that the Texas statute was constitutionally sound.[68]

The disparate conclusions of the plurality and dissenting opinions derive from basic philosophical differences.[69] Three elements define the Burger bloc's jurisprudence. First, these Justices emphasize the democratic principles embodied in the Constitution.[70] Once elected representatives have addressed an

63. Again, this designation is an oversimplification. Justice White, for example, often does not follow the views of his colleagues. *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (Brennan, Marshall, Blackmun, & Stevens, JJ. joining). Despite his gravitation to the conservative side of the Court, he remains sensitive to charges of racial discrimination. *See* City of Port Arthur v. United States, 457 U.S. 932 (1982). In her first Term on the Court, Justice O'Connor demonstrated a unique constitutional perspective. Although ordinarily deferential to the state, she was vigilant in the area of gender discrimination. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

64. 457 U.S. at 242 (Burger, C.J., dissenting).

65. *Id.* at 247; *see* 411 U.S. at 18.

66. 457 U.S. at 247-48.

67. *Id.* at 245 n.5, 246.

68. *Id.* at 248-53. The Chief Justice accurately characterized the reasoning of the *Plyer* majority as "unabashedly result-oriented." *Id.* at 244. A literal reading of precedent supports the dissenting view that neither the peculiar situation of the plaintiffs nor the relative importance of the individuals' interest in state benefits should determine the outcome of constitutional adjudication. *See Rodriguez*, 411 U.S. at 30; *see also* Youngberg v. Romeo, 457 U.S. 307, 324-25 (1982) (courts should defer to states concerning the quality of treatment due institutionalized retarded persons); Vance v. Bradley, 440 U.S. 93, 97 (1979) (rational basis test applied to age discrimination); Jefferson v. Hackney, 406 U.S. 535, 549 (1972) (rational basis test applied to welfare benefits legislation); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (rational basis test applied to tenant legislation); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (courts should defer even to legislative judgments that affect "the most basic needs of impoverished human beings"). The Chief Justice pointed out in *Plyler* that the majority offered no meaningful distinction between education and other essential government benefits. 457 U.S. at 247-48. Illegal aliens are currently ineligible for most federal assistance. *See* 7 C.F.R. § 273.4 (1983) (food stamps); 42 C.F.R. § 435.402 (1982) (Medicaid); 45 C.F.R. § 233.50 (1982) (AFDC). The plurality never resolved this dilemma. Justice Powell indicated, however, that denying other state benefits to undocumented children would be impermissible. *See* note 95 *infra*. One distinction between state-provided education and federally funded programs is that only Congress has constitutional authority to regulate immigration. *Compare* Fiallo v. Bell, 430 U.S. 787, 792-96 (1977) (sustained federal immigration legislation discriminating on basis of illegitimate birth) *with* Graham v. Richardson, 403 U.S. 365, 377-79 (1971) (invalidated state discrimination against legal aliens). Moreover, there is a qualitative difference between education and other government benefits: public school attendance is compulsory for all school-age children, while welfare recipients must meet stringent eligibility requirements.

69. *See generally* Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

70. According to Justice Rehnquist, it is Congress's prerogative, not the Court's, to recognize fundamental civil rights. *Id.* at 700.

issue, the Burger bloc is extremely reluctant to overrule their decision.[71] Unlike the activists on the Warren Court, these Justices ordinarily decline to exercise their power on behalf of minority groups and social reformers.[72] Accordingly, the present Court has restricted standing to sue the government,[73] diminished the reach of "state action" in fourteenth amendment litigation,[74] and limited the expansion of fundamental rights.[75]

The second element that defines the Burger bloc's judicial philosophy is a strong sense of federalism.[76] Federalism vests broad discretion in local governments and counsels against federal intervention in state affairs. This deference is the keystone of Justice Rehnquist's constitutional perspective.[77] Despite his reputation as a strict constructionist, Justice Rehnquist has identified the source of contemporary federalism in the opaque language of the tenth amendment,[78] giving the states' rights doctrine constitutional dimensions.[79]

Justice Rehnquist also strongly adheres to the third element of the Burger bloc's jurisprudence—positivism. Positivism theorizes that the applicable law consists solely of man-made statutes and that statutory construction should be governed by internal logic rather than external ethical considerations.[80] In-

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71. *See, e.g.,* Nixon v. Fitzgerald, 457 U.S. 731 (1982) (President is absolutely immune from civil damages prosecutions); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (pension benefits legislation upheld as neither arbitrary nor irrational); Ambach v. Norwick, 441 U.S. 68 (1979) (sustained state disqualification of legal aliens from teaching in public schools).

72. *See* Brown v. Socialist Workers '74 Campaign Comm., 103 S. Ct. 416, 428-32 (O'Connor, J., dissenting) (state campaign contribution disclosure statute was not unconstitutional as applied); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 487 (1982) (courts have no "special license" to correct government wrongdoing); City of Mobile v. Bolden, 446 U.S. 55, 70 (1980) (disproportionate effects insufficient to establish that voting scheme was racially invidious); Washington v. Davis, 426 U.S. 229, 246 (1976) (statistical evidence insufficient to establish that employment practices were racially invidious); *cf.* United States v. Richardson, 418 U.S. 166, 179 (1974) (constitutional challenge to CIA budget secrecy rejected on standing grounds).

73. *See, e.g.,* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982).

74. *See, e.g.,* Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

75. *See, e.g.,* Harris v. McRae, 448 U.S. 297 (1980) (abortion); City of Mobile v. Bolden, 446 U.S. 55 (1980) (voting).

76. *See generally* O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge,* 22 WM. & MARY L. REV. 801 (1981). Justice O'Connor proposes that state court judgments concerning the constitutionality of state laws should be given great deference by the federal judiciary. She views state and federal courts as equally competent to apply federal constitutional standards. But compare the decision of the federal district court in *Plyer* with a state appellate decision upholding the Texas law. *See* note 27 *supra.* Two differences insure disparity in temperament between state and federal courts: state court judges are popularly elected, while federal judges enjoy life tenure; and federal courts are less likely to feel the institutional restraint of state legislatures. *See* cases cited at note 132 *infra.*

77. *See* National League of Cities v. Usery, 426 U.S. 833 (1976).

78. *Id.* at 842; *see* U.S. CONST. amend. X ("[P]owers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

79. Justice Brennan decried the breadth of the holding in *Usery* and found no precedent to justify the result. 426 U.S. at 869 (Brennan, J., dissenting).

80. *See* J. ELY, DEMOCRACY AND DISTRUST 1-9 (1980).

deed, Chief Justice Burger has said that the Court's "duty . . . is not to do justice, but to apply the law and hope that justice is done."[81] In *Plyler*, the Burger bloc's perceived duty was to apply traditional equal protection analysis and to uphold the state legislature's exercise of its police power; the apparent injustice of the Texas statute was irrelevant.[82]

The philosophies underlying the plurality and dissenting opinions stand in irreconcilable conflict.[83] Judicial enforcement of unwritten fundamental rights is anathema to positivism. An expansive reading of a Living Constitution is incompatible with deference to state legislative processes. Yet, Justice Powell is able to mediate between these two extremes with the wisdom of Solomon.[84] In *Plyler*, Justice Powell succeeded at restraining the plurality's declaration of a broad right to education while rescuing a group of defenseless children from the caprice of a hostile legislature.

Justice Powell joined Justice Brennan's plurality opinion, but wrote separately to neutralize its precedential value by emphasizing "the unique nature of the case."[85] Unlike the Brennan bloc, Justice Powell firmly indicated that

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81. Bifulco v. United States, 447 U.S. 381, 402 (1980) (Burger, C.J., dissenting).

82. Chief Justice Burger granted that the Texas statute was "senseless." *Plyler*, 457 U.S. at 242 (Burger, C.J., dissenting). This concession appears to contradict his later conclusion that the legislation was rationally related to legitimate state interests. The Chief Justice reconciled these positions by saying that his personal opinion was immaterial because "the solution to this seemingly intractable problem is to defer to the political process, as unpalatable as that may be to some." *Id.* at 254. Given the popular support in Texas for the law, the Chief Justice's solution would not offer undocumented children much hope. *See* Doe v. Plyler, 458 F. Supp. at 589; Kane & Valarde-Munoz, *Undocumented Aliens and the Constituion: Limitations on State Action Denying Undocumented Children Access to Public Education*, 5 HASTINGS CONST. L.Q. 461, 461-65 (1978). Nor could the children find relief in Congress. Proposed legislation concerning undocumented workers would not have affected the Texas law. *See* S. 2222, 97th Cong., 2d Sess., 128 CONG. REC. S10619-31 (daily ed. Aug. 17, 1982).

83. This observation seems to account for the commentators' unanimous criticism of the Court's equal protection decisions. *See, e.g.*, Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality*, 8 HASTINGS CONST. L.Q. 777, 826 (1981); Perry, *supra* note 3, at 1082; Seeburger, *The Muddle of the Middle Tier*, 48 MO. L. REV. 587, 624-25 (1983); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutionality*, 61 VA. L. REV. 945, 978 (1975). The commentators concur only in their criticism of the Court's inconsistency; they present no uniform alternate doctrine. *See, e.g.*, Perry, *supra* note 3, at 1025 (criticizing Professor Wilkinson's article).

84. Two cases illustrate Justice Powell's influence on the development of equal protection doctrine. In Trimble v. Gordon, 430 U.S. 762 (1977) (5-4 decision) (Powell, J.), the Court held unconstitutional an Illinois statute which absolutely barred intestate succession by an illegitimate child to his father's estate. In Lalli v. Lalli, 439 U.S. 259 (1978) (5-4) (Powell, J.), the Court upheld a New York statute which allowed an illegitimate to share in his intestate father's estate only if paternity had been adjudicated prior to the father's death. *Trimble* was distinguished by Justice Powell as involving a complete disinheritance. *Lalli*, 439 U.S. at 273. No other Justice found the cases distinguishable. *See generally* Maltz, *Portrait of a Man in the Middle—Mr. Justice Powell, Equal Protection, and the Pure Classification Problem*, 40 OHIO ST. L.J. 941 (1979).

85. Plyler v. Doe, 457 U.S. at 236 (Powell, J., concurring). Justice Powell's hesitation is important because of his key position on the Court. In *Plyler*, Justice Powell stated that a statute which established a bona fide residency requirement for public school admission would not violate equal protection. *Id.* at 240 n.4. The Court upheld such a statute during the next Term. In Martinez v. Bynum, 103 S. Ct. 1838 (1983), the Court considered a facial challenge to a Texas statute

education is not a fundamental right.[86] He also stated that illegal aliens are not a suspect class.[87] Accordingly, Justice Powell maintained that the appropriate standard of review was not strict scrutiny, but the intermediate tier.[88]

Justice Powell's reluctance to identify expansive substantive rights or suspect classes stems from his agreement with the second Justice Harlan that the Court ought not sit as a "superlegislature."[89] Justice Powell is particularly unwilling to invalidate legislation enacted in the spirit of reform.[90] He departs from the positivists on the present Court, however, in his belief that the Court's tradition of restraint counsels caution in evaluating legislative judgments, not blind acquiescence.[91]

Justice Powell has been especially suspicious of legislative classifications which discriminate against illegitimate children.[92] In *Plyler,* he compared the plight of undocumented children to that of illegitimates.[93] He explained that neither group is accountable for its second-class status, yet both are singled out and penalized for their parents' misconduct.[94] The logical extension of this analogy is that undocumented children, like illegitimate children, will be entitled to intermediate judicial scrutiny in future cases.[95]

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which denied public school admission to minors who live apart from their parents or guardians if the primary motive for residing in the school district is to attend free public school. Finding that the legislation was a bona fide residency requirement, the Court applied the rational basis test. *Id.* at 1842 n.7. Justice Powell distinguished *Plyler* on the grounds that the legislation in *Martinez* was facially neutral and applicable to all school-age children. *Id.* at 1842. Justice Brennan concurred, stressing that the case involved only a facial challenge. *Id.* at 1845 (Brennan, J., concurring). Justice Marshall, relying on his *Plyler* concurrence, concluded that the statute impermissibly interfered with the fundamental right to education. *Id.* at 1852 (Marshall, J., dissenting).

86. 457 U.S. at 238 n.2.

87. *Id.*

88. *Id.*

89. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (Powell, J.) (quoting Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting)). In Frontiero v. Richardson, 411 U.S. 677 (1973), Justice Powell found that certain military regulations favoring males violated equal protection, but wrote separately to disassociate himself from the "far reaching implications" of Justice Brennan's plurality opinion holding that women constitute a suspect class. "[D]emocratic institutions are weakened and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance." *Id.* at 692 (Powell, J., concurring).

90. In upholding the legislation in *Rodriguez,* Justice Powell noted that the Texas system was implemented to extend and improve public education. 411 U.S. at 39. Similarly, in *Lalli,* Justice Powell recognized that the New York statute was a reform of the common law policy of imposing a total disability on illegitimates. 439 U.S. at 266.

91. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977).

92. *See* Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 169 (1972).

93. 457 U.S. at 238 (Powell, J. concurring).

94. *Id.*

95. Justice Powell indicated that it would be impermissible for a state to deny welfare benefits to an otherwise eligible undocumented child. *Id.* at 239 n.3. Justice Blackmun also warned that undocumented children "may not be denied rights that are granted to citizens." *Id.* at 236 (Blackmun, J., concurring). Justices Brennan, Marshall, and Stevens probably concur. *See* notes 56-57 and accompanying text *supra.* Thus, undocumented children should be treated in the future as a functionally suspect class. Justice Powell distinguished the status of the parents of undocumented children, however, since mature aliens are accountable for their unlawful entry. 457 U.S. at 240 n.5 (Powell, J., concurring). This distinction creates the difficult task of differentiating between parent and child with respect to public assistance programs like AFDC. In Ruiz v.

Underlying Justice Powell's analogy are two related canons of justice: legal burdens must be related to individual culpability,[96] and individuals should not be punished for their social inferiority.[97] In *Plyler,* Justice Powell recognized that the Texas statute burdened a class that had no control over its illegal status. In addition, the jurist viewed the statute as a punitive measure that was designed to subjugate a discrete class of children.[98]

Justice Powell announced a simple rule of distributive justice: "punitive discrimination based on status . . . is impermissible under the Equal Protection Clause."[99] His approach focuses not on the substantive interests involved, but on the dynamics of legislative classification. His role as a Justice is not to impress value judgments upon legislative bodies, but to remedy malfunctions in the lawmaking process.[100] Justice Powell is a cautious guardian of the "liberating spirit of the Equal Protection Clause."[101] Only in a rare case, such as *Plyler,* will he wield the heightened power of judicial review by applying the intermediate standard.

Unfortunately, Powell's definition of intermediate scrutiny—demanding a substantial relation to a substantial governmental interest[102]—is too vague to be analytically useful.[103] Still, the standard served two important functions in

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Blum, 549 F. Supp. 871 (S.D.N.Y. 1982) the court considered whether children of illegal aliens may be denied federal day care benefits because of their parents' status. Unlike the children in *Plyler,* the plaintiff children were United States citizens or lawful residents. *Id.* at 877. Construing the Social Security Act, the court held that the children were eligbile. In dicta, the court stated that the same result should be reached in AFDC cases. *Id.; see also* Holley v. Lavine, 464 F. Supp. 718 (W.D.N.Y.) (undocumented alien mother who received official assurance that she would not be deported while her citizen children remained dependent held eligible for AFDC), *aff'd,* 605 F.2d 638 (2d Cir. 1979). *But cf.* Darces v. Woods 131 Cal. App. 3d 269, 182 Cal. Rptr. 417 (1982) (state and federal laws that barred undocumented children from AFDC upheld against equal protection challenge).

96. *See Plyler,* 457 U.S. at 238 (Powell, J., concurring); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972); *cf.* Perry, *supra* note 3, at 1050-58 (Court should adopt "moral relevance" standard in equal protection cases).

97. *See Plyler,* 457 U.S. at 238. Moral innocence and social stigma usually coalesce. *See* note 84 *supra.* In Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1979), however, these factors were polarized. The university sought to aid minority applicants through a rigid quota which denied admission to otherwise qualified whites. Justice Powell ruled in favor of the plaintiff, reasoning that the equal protection clause protects innocent individuals from arbitrary state action, as well as prohibiting government suppression of disadvantaged minorities. *Id.* at 291-300. *Plyer,* on the other hand, involved a statute which ignored individual culpability *and* penalized a traditionally disadvantaged group.

98. 457 U.S. at 238-39 (Powell, J., concurring); *cf. Rodriguez,* 411 U.S. at 28 (Powell, J.) (Texas school funding system did not work to the peculiar disadvantage of any identifiable group).

99. 457 U.S. at 240 (Powell, J., concurring).

100. *See* J. ELY, *supra* note 80, at 136.

101. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 741 (1982) (Powell, J., dissenting). The male plaintiff in *Hogan* was denied admission to an all-female state nursing college. Justice Powell dissented from the holding that the state's gender-based exclusion of the plaintiff violated the equal protection clause, finding that *Hogan* was not a sex discrimination case. *Id.* at 745. It is doubtful that the male-dominated Missippi legislature intended to tyrannize Mississippi men by maintaining a school exclusively for women.

102. *Plyler,* 457 U.S. at 239 (Powell, J., concurring).

103. "Substantial" yields exponential ambiguity when used twice in the same phrase. Justice Rehnquist has warned that whatever the Court's internal understanding, deviations from

Plyler. It accommodated Justice Powell's dilemma, allowing him to invoke his canons of justice without applying the hyperbolic strict scrutiny standard. More importantly, it released the Court from the deferential rational basis test, enabling it to supervise the state.[104]

Plyler notwithstanding, the traditional two tier analysis will continue to be the dominant model for equal protection cases.[105] The present Court is committed to restraint, save in the most compelling circumstances.[106] In determining when circumstances are sufficiently compelling, it is history, not analysis, that provides the most able guide.[107] Thus, the foundation of the *Plyler* decision can be evaluated only by examining the Founding Fathers' conception of the federal judiciary and appraising the Court's institutional role under the equal protection clause.

The Founding Fathers established an independent federal judiciary with the expectation that the courts would protect individuals from governmental oppression.[108] Based on their colonial experience, these men knew that tyranny breeds discontent and inevitably undermines support for the government.[109] Consequently, they created a court system which could overrule the excesses of the legislative branch without the fear of partisan reprisal.[110]

From the moment Chief Justice Marshall declared that it is "the province

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traditional analysis inevitably confuse the lower courts. Craig v. Boren, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting). This concern is mitigated, however, if the two-tier analysis continues to dominate equal protection doctrine. *See* note 105 *infra*.

104. Justice Rehnquist had criticized the "diaphanous and elastic" intermediate standard as an unjustifiable affront to federalism and democratic decision-making. *Craig*, 429 U.S. at 221 (Rehnquist, J., dissenting). Even more elastic is Justice Marshall's sliding scale. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting).

105. In *Plyler*, Justices Blackmun and Powell reaffirmed their beliefs that the intermediate standard remains the exception rather than the rule. 457 U.S. at 232 (Blackmun, J., concurring); *id.* at 238-39 (Powell, J., concurring). Justice Brennan would employ the intermediate standard only "when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and our cases." *Id.* at 218 n.16; *see also* Martinez v. Bynum, 103 S. Ct. 1838, 1842-43 (1983) (Powell, J.) (bona fide residency requirement for public school admission sustained under rational basis test); *Rodriguez*, 411 U.S. at 31 (Powell, J.) (courts lack authority and competence to assume a legislative role through use of varying standards); *Craig*, 429 U.S. at 210 n. (Powell, J., concurring) (dissatisfaction with two-tier model does not justify further subdivision of equal protection scrutiny). *But cf.* J.W. v. City of Tacoma, 720 F.2d 1126 (9th Cir. 1983) (intermediate standard applied to strike down zoning legislation disfavoring former mental patients).

106. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221 (1981) (denying federal benefits to institutionalized mentally retarded persons sustained under rational basis test).

107. Moore v. City of E. Cleveland, 431 U.S. 494, 503 n.12 (1977) (Powell, J.).

108. *See* THE FEDERALIST NO. 78, at 145 (A. Hamilton) (A. Hacker ed. 1964).

109. *See id.* at 148; *see generally* R. HOFSTADER, THE AMERICAN POLITICAL TRADITION 3-21 (1974).

110. The federal judiciary's independence is protected by the guarantee of life tenure with undiminished compensation. *See* U.S. CONST. art. III, § 1. Hamilton felt that an appointed federal judiciary would provide the "essential barrier to the encroachments of the representative body." THE FEDERALIST NO. 78, *supra* note 107, at 148. United States District Judge William Justice, who presided over *Doe v. Plyler*, commented nearly 200 years later that his politically independent position made "all the difference." King, *A Loner in the Lone Star State—Conservative Texans Don't Hide Their Hate for Liberal Judge William Justice*, Boston Globe, Feb. 3, 1982, at 2, col. 2; *see also* note 76 *supra*.

and duty of the judicial department to say what the law is,"[111] however, the values of federalism and democracy have been at odds with the power of judicial review. Although the Founding Fathers designed the federal courts to act as a buffer between the people and the government, they did not intend for unelected judges to rule the nation.[112] Moreover, while the acts of the popularly elected branches are subject to judicial review, the only effective check on the Court's power is its sense of self-restraint.[113] Commentators have offered two considerations to circumscribe the Court's role.[114] First, the Court's interpretation of the Constitution must be consistent with the document's text and design. Second, the Court must offer an explanation for its authority to override majority rule. It is in relation to these two criteria that *Plyler v. Doe* must be measured.

Before 1868, the Court's review of state laws was limited because the Bill of Rights did not apply to the states.[115] The ratification of the fourteenth amendment, however, forever changed the face of federalism. Since its inception, the equal protection clause has suffered two competing interpretations. First, in the *Slaughter-House Cases,*[116] a bare majority of the Court held that the equal protection clause prohibits only racial discrimination.[117] The Court pointed out that the clause was originally proposed in response to the black codes enacted by southern states after the Civil War.[118] The second traditional interpretation of the equal protection clause was announced by the *Slaughter-House* dissenters.[119] They recognized that the immediate purpose of the clause was to guarantee racial equality, but maintained that the Civil War amendments signalled a radical shift away from the states' sovereign independence and toward the national government's preeminence.[120]

The debate subsided as the equal protection clause was "strangled in in-

111. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

112. Popular control of government is the cornerstone of the Constitution. *See* U.S. CONST. art. I, § 2, cl. 1; art. I, § 3, cl. 1; art. II, § 1, cl. 2; *see also* THE FEDERALIST No. 39 (J. Madison) (federalism); *id.* No. 48 (J. Madison) (separation of powers).

113. United States v. Butler, 297 U.S. 1, 78-79 (1936) (Stone, J., dissenting).

114. *See* J. ELY, *supra* note 80, at 11-41; Blattner, *supra* note 83, at 802; *see also* Auerbach, *The Unconstitutionality of Congressional Proposals to Limit the Jurisdiction of the Federal Courts,* 47 MO. L. REV. 47, 51 (1982).

115. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

116. 83 U.S. (16 Wall.) 36 (1873) (5-4 decision).

117. *Id.* at 81. Justice Rehnquist agrees with this narrow construction of the equal protection clause. *See* Trimble v. Gordon, 430 U.S. 762, 778 (1978) (Rehnquist, J., dissenting). He feels that any expansion of the equal protection clause beyond race should be left to Congress under § 5 of the fourteenth amendment. *See* Rehnquist, *supra* note 69, at 700; *see also* Pennhurst State School v. Halderman, 451 U.S. 1, 16 (1981) (Rehnquist, J.) (if Congress did not express its intent to legislate under § 5, law cannot be considered an enforcement provision of the equal protection clause).

118. The Slaughter-House Cases, 83 U.S. (16 Wall.) at 81; *see also* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 23 (3d ed. 1974).

119. 83 U.S. (16 Wall.) at 83-130 (Chase, C.J., Field, Bradley, & Swayne, JJ., dissenting).

120. *Id.* at 110 (Field, J., dissenting). Justice Brennan similarly views the equal protection clause as "an elementary limitation on state power." *Plyler,* 457 U.S. at 213.

fancy by post-civil-war judicial reactionism."[121] The promise of human dignity pursued during the First Reconstruction was revoked as the nation capitulated to southern racism.[122] The clause remained dormant for over fifty years. Gradually, in view of the Nazis' rise to power in Germany, the Court began to appreciate the importance of the power entrusted to it by the Framers of the fourteenth amendment. In 1938, Justice Stone suggested that the Court would begin to exercise a stronger role in protecting politically powerless minorities from legislative tyranny.[123] After the Second World War ended and the atrocities committed under German positive law came to light,[124] the Court understood that its duty was not simply to apply the law as written by the majority. Instead, its duty was to ensure that the law treated no one unjustly.[125] In *Brown v. Board of Education,*[126] this understanding came to fruition.

It is generally agreed that *Brown* marked the beginning of the modern era for the equal protection clause[127] as well as the inception of the Second Reconstruction.[128] After *Brown,* the Court boldly asserted its power to invalidate racially discriminatory legislation.[129] It began to interpret the open-ended language of the equal protection clause as a general mandate to strike down oppressive state laws and practices.[130] Although the Burger Court has checked the expansion of equal protection doctrine,[131] eight Justices continue to favor a generalist construction of the clause that allows anyone to invoke its applica-

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121. Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 381 (1949).

122. *See, e.g.,* Williams v. Mississippi, 170 U.S. 213 (1898) (disenfranchisement of blacks does not violate equal protection); Plessy v. Ferguson, 163 U.S. 537 (1896) (separate but equal doctrine); *see generally* C. VANN WOODWARD, *supra* note 118, at 67-111.

123. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.*

124. *See generally* B. BETTELHEIM, THE INFORMED HEART (1960) (dehumanizing effects of absolute adherence to positive law in Nazi Germany). The Nazis were the ultimate positivists. Citizens were duty-bound to obey government required acts of genocide. Moral considerations were irrelevant. Positivist thought also dominated the German legal community, encouraging "German lawyers to stand by at Nazi barbarism, declaring, '*Gesetz ist Gesetz*' (Law is Law)." 10 ENCYCLOPEDIA BRITTANICA *Legal Profession* 914, 920 (15th ed. 1982).

125. *See* Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."). Justice Jackson presided over the Nuremberg trials.

126. 347 U.S. 483 (1954) (unanimous decision) (overruling separate but equal doctrine).

127. *See* Wilkinson, *supra* note 83, at 987.

128. *See generally* C. VAN WOODWARD, *supra* note 118, at 1146-88.

129. *See* Reitman v. Mulkey, 387 U.S. 369 (1967); Gomillion v. Lightfoot, 364 U.S. 339 (1960); *see also* Cooper v. Aaron, 358 U.S. 1 (1958) (unanimous Court reaffirmed *Marbury* and rejected claim that *Brown* was unenforceable).

130. *See, e.g.,* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (initiated judicial protection of illegitimate children); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (struck down poll tax); Douglas v. California, 372 U.S. 353 (1963) (mandated appointed counsel for indigent criminal defendants taking state appeals); *see also* Reed v. Reed, 404 U.S. 71 (1971) (initiated heightened judicial scrutinty of gender discrimination); Graham v. Richardson, 403 U.S. 365 (1971) (legal aliens are a suspect class).

131. *See* cases cited note 68 *supra; see generally* J. ELY, *supra* note 80, at 148-49.

tion; only Justice Rehnquist prefers a race-bound interpretation.[132]

Despite its technical departure from recent precedent, *Plyler* is consistent with the Court's construction of the modern equal protection clause. Indeed, there is an unmistakable resemblance between *Plyler* and *Brown.* In *Plyler,* the Texas statute was designed to relegate the children of illegal aliens to a discrete social subclass. In *Brown,* the state sought to reinforce the social inferiority of black children by maintaining segregated schools. In each case, the Court found that the purposeful exclusion of children from the mainstream of society contravened the constitutional guarantee of equal treatment.[133]

Plyler also effectively answers the charge that the Court's exercise of judicial review is undemocratic. In accordance with the Founders' design, it is the Court's role to maintain the delicate balance between the government and the people by protecting politically powerless minorities from the tyranny of the majority.[134] In exercising this role, the Court should examine legislative classifications with special attention to three factors. First, the Court should ask whether the adversely affected group is an historical victim of popular prejudice and abuse.[135] Second, the Court should determine whether the legislative classification is intentionally designed to inflict inequality on a disfavored class,[136] or whether the resulting inequity is merely incidental to a legitimate state purpose.[137] Third, the Court should require that the adversely

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132. *See, e.g.,* Frontiero v. Richardson, 411 U.S. 677 (1973) (8-1 decision). Despite its judicial conservatism, the Burger Court has retained the view that the equal protection clause vests relatively broad authority in the federal courts to control the states. The general language in the fourteenth amendment evinces a congressional intent that the amendment serve as a flexible check on state action. *See* J. ELY, *supra* note 80, at 30, 149. *Compare* U.S. CONST. amend. XV (limited to race, color, and conditions of servitude). The context in which the fourteenth amendment was ratified also suggests an intent to limit state power so future regional rebellions would be prevented. *See* Brennan, *supra* note 50, at 394. There is evidence that the Framers intended that the courts exercise more stringent control over the states than over the federal government. *Compare* Nixon v. Fitzgerald, 457 U.S. 731 (1982) (President absolutely immune from civil damages liability) *and* United States v. Richardson, 418 U.S. 166 (1974) (article III confers no power for Court to evaluate national secrecy act) *with* Scheuer v. Rhodes, 416 U.S. 232 (1974) (governor entitled only to qualified immunity from civil damages liablity) *and* Baker v. Carr, 369 U.S. 186 (1962) (political question doctrine does not prevent judicial review of state legislative election apportionment scheme).

133. *Brown*'s reasoning has equal force in *Plyler.* Both cases halted state action which would have impressed upon schoolchidren "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown,* 347 U.S. at 494.

134. *See* Powell, *What Really Goes on at the Supreme Court,* 66 A.B.A. J. 721, 723 (1980).

135. *See* J. ELY, *supra* note 80, at 153; *see generally* G. ALLPORT, THE NATURE OF PREJUDICE (1954). Where prejudice is a factor, legislative decisions are more likely to be based on a desire to harm a disfavored group rather than to promote general welfare. Although not every law which disadvantages a minority group must be invalidated, a "more searching judicial inquiry" is demanded. United States v. Carolene Prods. Co. 304 U.S. 144, 152-53 n.4 (1938).

136. *See* Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) ("bare congressional desire to harm a politically unpopular group [hippies] cannot constitute a *legitimate* governmental interest" in denying them food stamps); *see generally* J. ELY, *supra* note 80, at 134-54.

137. *E.g.,* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); *see* J. ELY, *supra* note 80, at 155-59.

affected class has no recourse through the political process.[138] This approach focuses on the procedural fairness of legislative processes without second-guessing the substantive legislative decisions.[139] Centuries of experience have provided the judicial branch with a special expertise for evaluating procedural justice.[140] This accumulated experience and its politically detached perspective render the Supreme Court uniquely qualified to invalidate legislation predicated on prejudice.[141]

Conversely, when constitutional claims fall beyond the judiciary's special institutional competence, the Court must exercise restraint.[142] For example, it is improper for the Court to declare broad substantive rights in the manner of a legislative body.[143] Nor is it appropriate for the Court to act as a general overseer of governmental affairs. Rather, the Court's essential responsibility is to vindicate the guarantee of equal protection without impairing democratic principles.[144]

Viewed in this context, *Plyler v. Doe* represents an affirmation of the judiciary's duty to defend the powerless. The Texas legislature had targeted a discrete class of resident undocumented children to endure the disability of illiteracy. *Plyler* presented the three model elements of an equal protection violation—prejudice, transparent intent to discriminate, and impossibility of political recourse.[145] The statute was invalidated because it was fundamentally oppressive and unjust. Although the case surely involved a result-oriented approach, it did not necessitate resort to some "seemingly neutral judicial doctrine"[146] as a facade; the decision stands quite ably under the equal protection clause. *Plyler* does not mark the demise of traditional two-tier analysis. It does

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138. Federal judicial intervention was designed as a last resort, to be invoked only when minorities are frustrated at the ballot box. *See* THE FEDERALIST NO. 10 (J. Madison); *see, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966) (poll tax invalid).

139. *See* J. ELY, *supra* note 80, at 157, 166-67.

140. *See id.* at 121.

141. *See id.* at 145-47. *But see* Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1165 (1978).

142. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 58 (1973).

143. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973). Broad substantive declarations inevitably occasion unseemly retreats in future cases. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

144. Justice Powell has defined the centrist position on the scope of the judiciary's authority:

> The irreplaceable value of the power articulated by Chief Justice Marshall lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory governmental action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.

United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

145. *See* notes 22-28 and accompanying text *supra*.

146. *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 1, 140 (1982) (political question or preemption would have been more suitable grounds for deciding *Plyler*).

reveal, however, that the Supreme Court remains a court of justice, and not merely a court of law.

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